REME COURT, U. S

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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MICHAEL RODAK, JR., CLER

No. 75–1014

ARIZONA PUBLIC SERVICE COMPANY, TUCSON GAS AND ELECTRIC COMPANY, NEVADA POWER COMPANY, and SOUTHERN CALIFORNIA EDISON COMPANY,

Petitioners

v.

ARIZONA POWER POOLING ASSOCIATION, an Arizona corporation, ARIZONA POWER AUTHORITY, an agency of the State of Arizona, INTERMOUTAIN CONSUMER POWER ASSOCIATION, a Utah corporation and BOUNTIFUL, UTAH, a municipal corporation

Respondents

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

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MEMORANDUM FOR RESPONDENTS, ARIZONA POWER POOLING ASSOCIATION AND ARIZONA POWER AUTHORITY IN OPPOSITION

Respondents, Arizona Power Pooling Association and Arizona Power Authority, submit that the Court should deny the petition for a writ of certiorari filed herein by Petitioners Arizona Public Service Company, Tucson Gas and Electric Company, Nevada Power Company and Southern California Edison Company.

STATEMENT OF THE CASE

Respondents accept Petitioners' "Statement" (Pet. 2-7) except that Respondents disagree with Petitioners' characterization of this case as one concerning the "propriety" of certain judicially-imposed limitations on the authority conferred upon the Secretary of the Interior by the Colorado River Basin Project Act. . . " (Pet. 2)[1] This case concerns the propriety of a judgment of a Court of Appeals setting aside a District Court's order granting a motion for summary judgment against Respondents in which there must be accepted as true all allegations of fact pleaded by Respondents, including the allegation that the Secretary had refused to comply with legislatively-imposed limitations on his authority. Thus, this case deals not with the propriety of *judicially*-imposed limitations on agency action but with *legislatively*-imposed limitations on agency action in the context of a motion for summary judgment.

REASONS FOR DENYING CERTIORARI

Certiorari should be denied because the case does not present any novel questions of federal law requiring resolution by this Court. The holding of the Court of Appeals, that the preference provision of the Federal reclamation laws (43 U.S.C. §485h(c)) applies to the interim power available to the Secretary of the Interior under the Colorado River Basin Project Act ("Act") 43 U.S.C. §§1501 *et seq.*, accords, as recognized by the Secretary of the Interior,[2] with the text

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[1]Respondents note that the Government, which was a party to this proceeding in the courts below, has not requested a stay of the Court's mandate nor given any other indication that it intends also to file a petition for a writ of certiorari.

[2]The Secretary's Brief in the Court below expressly recognized (at p. 14) that: "Among the factors to be considered in preparing 'the most feasible plan' was the federal reclamation laws' requirement that in the sale of electric power certain public utilities *must* be given a preference." (Emphasis supplied)

and legislative history of that Act as well as established precedent. Likewise, the Court of Appeals properly held that the Secretary's failure to comply with the preference provisions was subject to judicial review. Petitioners' claims, that the Court's ruling is based on "contrived reasoning" (Pet. p. 8) and that by authorizing the Secretary to select the most feasible plan for obtaining the power needed for the Central Arizona Project, the Act vested the Secretary with unreviewable discretion as to the applicability of the preference provisions, thereby bringing it within the narrow exception to reviewability recognized in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1970), are themselves contrived and totally without merit.

I. THE COURT OF APPEALS PROPERLY HELD THAT THE POWER PREFERENCE PROVISIONS OF THE RECLAMATION LAWS ARE APPLICABLE TO THE THERMAL POWER ACQUIRED BY THE GOVERNMENT UNDER THE COLORADO RIVER BASIN PROJECT ACT

Contrary to Petitioners' argument (Pet. 9-12), the Court of Appeals' holding, that the power preference provisions of the reclamation laws (*e.g.* 43 U.S.C. §485h(c)) apply to the thermal power acquired by the Secretary of Interior under the Colorado River Basin Project Act for use in connection with the Central Arizona Project, is required by the clear language and legislative history of that Act. Section 1554 thereof, 43 U.S.C. §1554, provides in pertinent part as follows:

> "Except as otherwise provided in this Act, in constructing, operating and maintaining the units of the Projects herein and hereafter authorized, the Secretary [of the Interior] *shall* be governed by the federal reclamation laws (Act of June 17, 1920; 32 Stat. 388, and the Acts amendatory thereof or supplementary thereto) to which laws this Act shall be deemed a supplement." (Emphasis supplied)

The reclamation laws referred to provide among other things that the federal government must give preference to "[a]ny sale of electric power.... made by the Secretary in connection with the operation of any project... to municipalities and other nonprofit organizations financed... by loans made pursuant to the Rural Electrification Act of 1936"[3] Petitioners argue that this preference clause applies only to hydro power and not thermal power.

The Colorado River Basin Project Act does not limit the Secretary to hydroelectric facilities from which to acquire power. Rather, the Act expressly permitted the Secretary to utilize both hydro power and thermal power. Indeed, 43 U.S.C. §1523(a) even encouraged the acquisition of power from thermal facilities by prohibiting the construction of additional hydroelectric facilities on the Colorado River between Hoover and Glen Canyon dams. Once acquired, and when not needed for operation of the Central Arizona Project pumps, Congress authorized the sale of such power in conjunction with sales of other federally-owned power already governed by the preference provisions. Section 1523(b) provides in pertinent part:

> "When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine, *including its marketing in conjunction with the sale of power and energy from Federal power plants in the Colorado River system so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates.*" (Emphasis supplied)

Thus, in addition to explicitly subjecting the activities of the Secretary of the Interior to the reclamation laws in

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[3]Reclamation Project Act of 1939, Section 9(c), 43 U.S.C. §485h(c).

Section 1554 of the Act, Congress foresaw and enacted into law a marketing program for surplus federal power which would integrate newly available thermal power with existing hydro power for sale through an optimum, integrated marketing program. There is not the slightest hint that different marketing criteria would apply to thermal power as against hydro power. To accomplish such a feat would require the Secretary of the Interior to disintegrate resources which the Congress clearly intended should be integrated.

The legislative history of the Act similarly discloses a Congressional intent that the preference provisions be fully applicable to any and all power, thermal as well as hydro, acquired by the Secretary under the Act. For example, in deleting the so-called Kuchel amendment as surplusage,[4] the Conference Report stated in pertinent part (H. Rep. No. 1861, 90th Cong., 2d Sess. p. 24 (1968)):

> "* * * [T]he sale or disposition of power or energy acquired pursuant to section 303 and surplus to the requirements of the central Arizona project will be in accordance with the provisions of section 9 of the act of August 4, 1939 (53 Stat. 1193), as amended [the preference clause]. We believe this is to be in accord not only with the Secretary's testimony before the House and Senate committees but with the 'Summary Report, Central Arizona Project With Federal Prepayment and Power Arrangements, dated February 1967,' and will not limit the Secretary in his use and disposition of the

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[4]The amendment had been offered earlier by Senator Kuchel and accepted by Senator Jackson, the bill's Senate floor manager, in order "to eliminate any question" and thereby make it clear that the preference provisions applied to the Government sale of Navajo power. See, S. Rep. No. 408, 90th Cong., 1st Sess., pp. 112-113 (1967); 113 Cong. Rec. 2176 (1967).

pre-purchase capacity for project purposes or other purposes authorized by this act."[5]

Petitioners claim (Pet. pp. 9-10), that the Court's decision below involves an unprecedented application of the federal preference provisions to Government-owned thermal power, ignores the fact that, as noted by the court below (Pet. App. 26), "the preference clause has previously been applicable only in the context of sales of federally-owned hydro electric power because prior to the Colorado River Basin Project Act, the Government had never been authorized to obtain rights to thermally-generated electric power."

Historically, any disparity in regulatory treatment between thermal and hydro power has arisen solely from special, physical characteristics of the *generation* of hydro power and does not relate in any way to the *marketing* of such power once generated. See, *e.g., Pennsylvania Water and Power Co. v. FPC*, 343 U.S. 414 (1952) and *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964). As a matter of fact, the preference provisions have been consistently applied in all three of the instances–the Tennessee Valley Authority,[6] the Atomic Energy Commission[7] and the Bonneville Power Administration[8]–in which Government agencies have been concerned with the disposition of thermal power.

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[5]See also Hearings on S. 1004 Before the Subcomm. on Water and Power Resources of the Senate Comm. on Interior and Insular Affairs, 90th Cong., 1st Sess. p. 27 (1967) ["Senate CAP hearings"]; Hearings on H.R. 3300 Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 90th Cong., 1st Sess. p. 89 (1967) ["House CAP Hearings"].

[6]16 U.S.C. §831 i.

[7]42 U.S.C. §2064.

[8]16 U.S.C. §§832 b, c and d. A description of Bonneville Power Administration's "Hydrothermal Power Program" appears in *Hearings on Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Bill, 1971, Before a Subcomm. of the House Comm. on Appropriations*, 91st Cong., 2d Sess. p. 872 (1970).

Finally, Petitioners' argument (Pet. pp. 11-12), that the preference provisions are inapplicable because they relate only to power generated at facilities owned by the Government whereas here the Government is only purchasing power generated at facilities owned by others is not only anomalous but constitutes the height of bootstrapping. Congress accepted the Interior recommendation that it be authorized to purchase the output of a thermal electric project rather than constructing and owning one itself in order to avoid the vigorous opposition to such ownership which had been mounted by privately-owned utilities such as Petitioners in the past.[9]

II. THE COURT OF APPEALS PROPERLY HELD THAT THE SECRETARY OF THE INTERIOR'S FAILURE TO COMPLY WITH THE PREFERENCE PROVISIONS WAS SUBJECT TO JUDICIAL REVIEW

Petitioners attempt to obscure the reviewability of the Secretary of the Interior's failure to apply the preference provisions by trying to tie it with the Secretary's authority to obtain power for the Central Arizona Project. There is no question that Congress bestowed wide discretionary authority in the Secretary in authorizing him to recommend the "most feasible plan" for obtaining such power. (See 43 U.S.C. §1823(b)) But the fact that the Secretary has such discretion begs the question. The real question is whether the Secretary's discretion, however broad, is subject to any limitation? In the words of *Overton Park, supra,* is there any law to apply? If the answer is yes, judicial inquiry is proper and the Secretary's actions are reviewable.

The court below expressly held that the Act did not vest the Secretary with unbridled discretion. Thus, the court pointed out that although the Secretary had broad discretion, that discretion nevertheless was subject to at least one limitation imposed by the power preference provisions of the reclamation laws. As stated by the court below:

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[9] *E.g.*, Senate *CAP Hearings, supra* note 22, at 142, 147-8; House *CAP Hearings,* at 256, 259, 261.

> "The language of 43 U.S.C. §§1523(a) and (b) authorizing the Secretary to devise 'the most feasible plan' for obtaining pumping power for the Central Arizona Project would seem to endow him with almost unlimited authority in orchestrating all phases of the project. By inserting §1554 into the test of the Colorado River Basin Project Act, however, Congress circumscribed that discretion in at least one area by making his actions subject to the federal reclamation laws. Since we have determined (see Part II infra) that the preference clause *is* applicable to the power sales at issue here, we must examine its language to determine what degree of freedom the Secretary has in any given situation in deciding whether it must be applied." (Pet. App., 29, emphasis in original)

In light of this limitation upon the Secretary's discretion, the Court below properly held that the Secretary's failure to comply with the preference provisions was subject to judicial review. This Court has already held that judicial review is the rule and not the exception with non-reviewability "a very narrow exception," at the most. *Overton Park, supra* at 410. Furthermore, "it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Overton Park, supra* at 410. Given the fact that the Colorado River Basin Project Act makes the preference provisions of the reclamation laws applicable to the Secretary's disposition of the power acquired under that Act, it follows that the Secretary's failure to apply that preference is subject to judicial review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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